No. 1180

APR 30 1946
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

THE E. C. SCHROEDER COMPANY, INCORPORATED,
Petitioner,

v.

M. L. CLIFTON, FOR HIMSELF AND AS AGENT FOR
E. M. AVERY, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

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E. M. AVERY, ET AL., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT.

Petitioner prays that a writ of certiorari issue to review that part of the judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on January 24, 1946 (R. 113) reversing the judgment of the District Court of the United States for the Eastern District of Oklahoma, which sustained the cross appeal by respondents.

OPINIONS BELOW.

The findings of fact and conclusions of law in the District Court (R. 72-78) are not reported. The opinions in the Circuit Court of Appeals (R. 97-113) are not yet officially reported.

JURISDICTION.

The judgment of the Circuit Court of Appeals was entered January 24, 1946 (R. 113). An order denying this petitioner's petition for rehearing was entered February 27, 1946. The jurisdiction of this court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED.

I. Whether workmen who are engaged in quarrying gravel and rock which are used locally by others for the new construction of a dyke (as part of a dam and reservoir project) to prevent inundation of an existing oil field, which produces oil that moves in interstate commerce, are engaged in a process or occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act.

II. Whether workmen who transport rock from a quarry to a local site where it is used by others for the new construction of a dyke (as part of a dam and reservoir project) to prevent inundation of an existing oil field, which produces oil that moves in interstate commerce, are engaged in a process or occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act.

STATUTES INVOLVED.

The Fair Labor Standards Act of 1938 (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. Sec. 201 *et seq.*) provides in part as follows:

Section 3. Definitions

As used in sections 1-19 of this Act

* * * * * * *

(b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or from any State to any place outside thereof.

* * * * * * *

(i) "Goods" means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any State.

Sec. 7. Maximum hours

(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * * *

(3) for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

STATEMENT.

This suit was instituted as an employee suit for overtime compensation and liquidated damages under the Fair Labor Standards Act of 1938[1] (Act of June 25, 1938, 52 Stat. 1060, 29 U.S.C. 201, *et seq.*).

The respondents (hereinafter referred to as plaintiffs) were employees of petitioner (hereinafter referred to as defendant). Defendant is a quarrying and mining concern.

[1] Hereinafter referred to as the Act.

Plaintiffs fall into three classes: (a) those who quarried rock for the railroad and highway jobs hereafter described (R. 18, 40-42), (b) those who quarried rock for the dyke hereafter described (R. 18, 44-45), and (c) those who hauled rock from the quarry to the dyke (R. 18, 42-43). This petition is concerned with only the latter two classes.

Congress in 1938 authorized construction of the Denison Dam on the Red River. The water impounded by the dam when completed would inundate portions of a railroad and of an interstate highway (R. 72). These waters would also flood part of the Cumberland Oil Field in Oklahoma. This field was discovered before construction of the dam commenced, and the oil produced from the field moves in interstate commerce (R. 75). The United States assumed the obligation of protecting the oil field, and as part of the dam and reservoir project awarded a contract for the construction of a dyke around the field (R. 47, 75). Contracts were also awarded for relocation of the railroad and highway (R. 72). The contractors for the relocation of the railroad and highway made a subcontract with the defendant to produce gravel cushion and rip rap from quarries on lands leased by the contractors (R. 73). The rock was delivered at the quarry to the contractors' trucks (R. 73). The prime contractor for the dyke subcontracted part of the job to Lambert Bros., Inc., which sublet a part of its subcontract for the production of gravel cushion and rip rap to defendant (R. 76). The terms were similar to the other contracts, except that defendant agreed to and did deliver quantities of rock to the dyke site (R. 76). The rock for all jobs was quarried and processed in Oklahoma and never left that State, but was used upon projects wholly situated in Oklahoma (R. 74, 76). The dyke was new construction on unimproved land (R. 47). Rock was used in the dyke to prevent wave erosion from the impounded water (R. 76).

One class of plaintiffs here involved consisted of mechanics, laborers and power shovel operators at the quarry, whose work consisted of mining, processing and producing

gravel cushion and rip rap for the dyke (R. 73-74, 76). The other class consisted of employees who were drivers for trucks hauling rock to the dyke site (R. 76). These drivers dumped the rock either directly upon the dyke construction or into cranes which placed it on the dyke (R. 76). None of the plaintiffs was employed in any capacity in the physical construction of the dyke unless the incidental dumping of the rocks from the trucks by the drivers be so considered (R. 76).

The plaintiffs were not paid time and one half for any hours worked in excess of forty in any one workweek. The basis for computing the amount of recovery, if any, has been stipulated separately as to each class of the plaintiffs (R. 18, 42-45).

The District Court Decision. In findings and conclusions dated January 25, 1945, District Judge Broaddus held for the defendant on all points, concluding that none of the workmen involved was engaged in covered employment (R. 64-69). Plaintiffs moved for a new trial (R. 70-71).

Pending hearing on the motion, the Administrator of the Wage-Hour Division of the Department of Labor promulgated on March 13, 1945, Interpretative Bulletin, A-14, in which he reversed the long-standing prior position taken by the Division in respect of coverage of the Act in the sand and gravel industry. The Administrator filed a brief *amicus curiae* urging that the statute be applied in accordance with the new interpretation. Judge Broaddus made amended findings and conclusions on April 19, 1945 (R. 72-78). In these he held that workmen engaged in quarrying rock for use upon the relocated highway and railroad were engaged in the production of goods for commerce and covered by the Act (Conclusions B and C, R. 74-75). Though no workmen engaged in building the dyke were involved, Judge Broaddus ruled that such workmen were erecting the dyke as protection for the production of the oil field and were engaged in an occupation necessary for the production of goods in commerce (Conclusion D,

R. 77). As to the employees engaged in quarrying and transporting rock for the dyke, Judge Broaddus held that they were "further removed in degree" than the dyke workmen, and were not entitled to the benefits of the Act (Conclusion E, R. 77).

Defendant appealed from that part of the judgment which held it liable under the Act with respect to rock quarried for the railroad and highway (R. 82). The plaintiffs perfected a cross appeal from that part of the judgment which denied recovery for work done in quarrying and transporting rock for the dyke (R. 83). The Administrator of the Wage and Hour Division of the Labor Department joined in the appeal, but not in the cross-appeal. In his brief on the appeal, he explained that he regarded spreading of rock or equivalent work in connection with *actual construction* of the dyke as covered. He obviously did not consider the mere furnishing of material for the dyke as such covered employment.

The Circuit Court of Appeals for the Tenth Circuit reversed the District Court on the appeal and the cross-appeal, but no two judges were able to agree on the entire decision. Circuit Judge Bratton in the majority opinion held that the District Court should be reversed on both rulings; *i.e.* that employees who quarried rock for the railroad and highway were not covered by the Act, but that those who quarried and hauled rock for the dyke were covered (R. 97-105). Judge Phillips concurred in part and dissented in part, on the ground that none of the plaintiffs was covered by the Act (R. 106-112). Judge Huxman also concurred in part and dissented in part, being of the opinion that all the employees were covered (R. 113).[2]

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[2] On April 18, 1946, Mr. Justice Rutledge granted an extension of time to May 19 to plaintiffs within which to petition for a writ of certiorari from the reversal of the appeal.

SPECIFICATION OF ERRORS TO BE URGED.

The Court below erred:

1. In holding that the quarrying and processing of rock for local construction of a new dyke constituted the production of goods for commerce within the meaning of the Fair Labor Standards Act.

2. In holding that hauling of rock from the quarry to the local construction site of a new dyke constituted the production of goods for commerce within the meaning of the Fair Labor Standards Act.

3. In holding that quarrying, processing and hauling rock for the local construction of a new dyke had such a close and immediate tie to an integrated effort designed to effectuate the continued production of oil and its movement in interstate commerce that the employees were engaged in the production of goods for commerce.

REASONS FOR GRANTING THE WRIT.

The court below held that plaintiffs were engaged in the production of goods for commerce within the meaning of Section 3(j) of the Act. Whether an activity is "necessary to the production" of goods for commerce must be based upon the facts of the particular situation. Thus far, four judges and the Administrator have considered the applicability of the Act to these workers. Of these, the District Judge, one Circuit Judge and the Administrator considered that the Act did not apply, whereas two of the Circuit Judges ruled that it did.

Obviously, not all activities which are necessary to the production of goods for commerce in the sense of mere causative connection are covered by the Act, for then literally all activities within the country would be covered. Congress did not so intend. On the other hand some activities, while not strictly the physical production of goods, are clearly necessary to such production within the meaning of the Act.

The determination is necessarily one of degree, but this Court has established criteria for the guidance of the administrative authorities, employers and the lower courts. We believe that the decision below wrongly interprets these criteria, and is in conflict with decisions both of this Court and other Circuit Courts of Appeal, and with the Administrator's interpretation of the Act. The decision extends coverage of the Act far beyond the point reached by any other court, and draws the local operations of material men within the ambit of the statute for the first time. It therefore presents an important question as to the proper interpretation and application of the Act. On both grounds, we believe that review by this Court is fully warranted.

I.

THE DECISION OF THE COURT BELOW EXTENDING THE COVERAGE OF THE ACT TO MATERIAL MEN FOR THE DYKE IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUIT COURTS OF APPEAL.

This Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, established the test that to be covered by the Act the work of the employees must have

> "such a close and immediate tie with the process of production for commerce, and . . . therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'." 316 U. S. at 525-526.

In *10 East 40th Street Building, Inc.*, v. *Callus*, 325 U. S. 578, the boundary as to how far the meaning of "necessary" may go was delineated. In holding that maintenance of an ordinary office building was not activity covered by the Act the Court said:

> ". . . merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as

finished goods, does not bring it within the scope of the Fair Labor Standards Act.

* * * * * *

". . . we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation." 325 U. S. at 582-583.

The decision below is in conflict with these principles. An activity more essentially local can scarcely be imagined than quarrying and transporting rock to a local site where it will remain until the end of time. The chain of causation is long; long beyond anything hitherto encompassed by the Act. The plaintiffs quarried rock: contractors for the United States used the rock in new construction of a dyke as part of a dam and reservoir project; the dyke when completed would confine water to be impounded by a separate dam to be built: these future waters would, if not confined, spread to an oil field: this would hamper the production of oil: the oil would therefore not move as freely in interstate commerce.

The chain of causation would be one link shorter had the employees been concerned directly with the construction of the dyke rather than in quarrying rock for it. Hence the decision below conflicts squarely with the decisions of the Circuit Courts of Appeals that employees engaged in the construction of new buildings where goods for commerce will be produced are not engaged in an occupation "necessary" to the production of goods for commerce within the meaning of Section 3(j). *Wells* v. *Ford, Bacon & Davis, Inc.*, 145 F. (2d) 240 (C. C. A. 6th) affirming 7 CCH Labor Cases 65,608 (W. D. Ky.) (not officially reported); *Barbe* v. *Cummins Const. Corp.*, 138 F. (2d) 667 (C. C. A. 4th), affirming 49 F. Supp. 168 (D. Md.); *Cf. Nieves* v. *Standard Dredging Corp.*, 152 F. (2d) 719 (C. C. A. 1st) (dredging and fill for future naval base not covered). The Circuit

Court of Appeals for the Eighth Circuit considered the case of employees one step further removed than construction workers—that of guards for the premises and materials of a new factory which when completed will produce goods for commerce. The Act was held not to apply. *Noonan* v. *Fruco Const. Co.*, 140 F. (2d) 633 (C. C. A. 8th).

The line of authority in the District Courts is unbroken that construction work on new structures which when completed will be used in commerce or in the production of goods for commerce is not an occupation covered by the Act. *Collins* v. *Ford, Bacon & Davis, Inc.*, 9 WHR 346 (E. D. Pa.); *Kelly* v. *Ford, Bacon & Davis, Inc.*, 9 WHR 345 (E. D. Pa.); *Brue* v. *J. Rich Steers, Inc.*, 60 F. Supp. 668 (S. D. N. Y.); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 60 F. Supp. 670 (W. D. Wash.); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 F. Supp. 982 (E. D. Pa.); *Dollar* v. *Caddo River Lumber Co.*, 43 F. Supp. 822 (W. D. Ark.); *Muldowney* v. *Seaberg Elevator Co., Inc.*, 39 F. Supp. 275 (E. D. N. Y.). *A fortiori*, the production of rock or brick for local construction is not within the Act. *Adams* v. *Wewoka Brick & Tile Co.*, 5 CCH Labor Cases 63,200 (E. D. Okla.).

Walling v. *Patton-Tulley Transp. Co.*, 134 F. (2d) 945 (C. C. A. 6th) is not opposed to these decisions, for there the workers who built dykes and revetments on the Mississippi and Missouri rivers were considered to be maintainers of an instrumentality of commerce and therefore engaged in commerce upon the authority of *Overstreet* v. *North Shore Corp.*, 318 U. S. 125. The extension of the Act to the suppliers of material for such maintenance however, is forbidden by *McLeod* v. *Threkeld*, 319 U. S. 491. In this very case, the Court below so ruled (R. 104). The lower courts have similarly uniformly held that off-the-road workers such as these are not covered though the maintenance workers are. *Ramos* v. *P. R. Cement Corp.*, 10 CCH Labor Cases 68,775, (D. Puerto Rico); *Walling* v. *Craig*, 53 F. Supp. 479 (D. Minn.); *cf. Oliphant* v. *Kaser*, 10 CCH Labor

Cases 68,570 (District Court of Dallas County, Iowa). In the *Craig* case the court's conclusion of law as to employees such as these was:

> "Defendants' employees employed off the road and described generally as 'off-the-road employees' who produce and prepare local materials as sand, gravel, rock or earth, or who operate stationary off-the-road bituminous plants, are not engaged in the production of goods for commerce or in commerce or in work so closely related thereto as to be practically a part thereof and are not within the coverage prescribed by the Act." 53 F. Supp. at 483.

II.

THE DECISION OF THE COURT BELOW THAT PLAINTIFFS WERE ENGAGED IN THE PRODUCTION OF GOODS FOR COMMERCE IS AN ERRONEOUS CONSTRUCTION OF AN IMPORTANT FEDERAL STATUTE.

The production and local transportation of rock which never moves outside the state is not in and of itself production of goods for commerce. *Adams* v. *Wewoka Brick & Tile Co., supra; Walling* v. *Craig, supra; Ramos* v. *P. R. Cement Corp., supra.* Nor is it such production if the dyke be regarded as a thing produced, for such a structure does not fall within the meaning of the word "goods" as used in the Act. *Engebretsen* v. *E. J. Albrecht Co.*, 150 F. (2d) 602 (C. C. A. 7th). The decision of the Court below therefore must rest entirely on the conception that there existed an integrated effort for the protection of the oil field and that all workers associated in any way with that effort fall within the scope of the Act.

This reasoning is a new approach to the coverage of the Act. In *Warren-Bradshaw Co.* v. *Hall*, 317 U. S. 88, this Court held that employees who drilled oil wells part of the way down, but not all the way to the oil, bore a sufficiently "close and immediate tie" to production to fall within the language of the Act. This decision, however, extends that concept to entirely new areas. Here the integrated effort

which the court found was not for the production of oil, but for the protection of the field. A local activity which merely supplies materials for such protection—not for production—is deemed to be engaged in the production of goods for commerce.

The Act is "the rule by which employers and workmen must order their daily lives (*Western Union* v. *Lenroot*, 323 U. S. 490, 508), yet the reasoning of the Court below affords no practical test for the guidance of the Administrator or employer. Thus, to the average man the construction of the dyke, if part of any integrated project, would seem to be part of the dam project which would impound the waters which the dyke was to restrain rather than a part of oil production. Such theoretical discriminations are mere traps for a businessman, yet a similar question will arise whenever the concept is used to impose liability. For instance, is the digging of ditches for a fireline system within the concept of protection of production of goods for commerce within the town, or is it part of a purely local project? Does the local supplier of fence posts for a pasture fall within the concept of protection of interstate traffic from roaming cattle or within the concept of farming? Under this rationale, furthermore, the consistent rulings that new construction is not within the Act will be necessarily ignored except in the case of the first factory of a new company, for every later new structure falls within the concept of a part of the integrated effort of the manufacturer to produce goods for commerce.

We repeat that the construction of the dyke is not involved: the decision reaches beyond workers on that new structure and applies the Act to workers who quarried and hauled rock for it. Not even the Administrator construes the Act as going this far. The Administrator did not participate in the cross-appeal from the decision that the workers with which this petition is concerned were not engaged in commerce or the production of goods for commerce. In his brief filed *amicus curiae* in the Court below on the direct appeal he stated

> ". . . the Administrator is of the view that the (District) Court below correctly held that *construction* of the dyke is a 'process or occupation necessary to the production of' the oil for interstate commerce. Consequently, it is the Administrator's view that *if the employees in question spread materials on the construction site or perform other equivalent work in connection with the actual construction of the dam*, their activities are closely enough related to the production of oil for commerce as to be 'necessary' to such production and covered by the Act." Brief for the Administrator, p. 2, n. 1 (italics ours).

Under this interpretation, none of the plaintiffs here involved is covered by the Act, for the District Court found that none participated in actual construction of the dyke. One group of them had no conceivable part in "actual construction", for all their labors were at the quarry 12 miles from the construction site (R. 18, 44-45, 76, 94). The other group's only connection with actual construction was the incidental dumping of the rock from the trucks by the drivers, sometimes into proper place rather than into the cranes which ordinarily spread and placed it (R. 76).

III.

The questions involved are important.

The impact of the decision is enormous. The ruling of the court below that off-the-road material men who supply rock for a purely local construction job are covered by the Act because the completed structure will protect future operations of a producer for interstate commerce is sweeping in its effect on industry. The furnishing of material for construction of local fire and water lines, local sewers, or local factories falls within the broad concept, for each can be deemed equally well to have a "close and immediate tie to the integrated effort designed to effectuate . . . continued production . . . and . . . movement in interstate commerce" (R. 105). Never before have such off-the-road

material men been deemed to be engaged in occupations necessary to production of goods for commerce, whether the materials were used to make highways and railroads, to construct factories or to be used in any other manner for building within the state of their origin. We believe this new interpretation as applied in this case violates the clear intent of Congress to leave purely local business to the protection of the states, and the decisions of this Court interpreting the Act.

CONCLUSION.

WHEREFORE, it is respectfully requested that this petition for a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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MAY, 1946.

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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Pursuant to the permission granted by Paragraph 3 of Rule 38 of the Rules of this Court, respondents file this response in opposition to the petition for writ of *certiorari* filed herein.

OPINION BELOW

The opinion of the Circuit Court of Appeals is now reported in 153 Fed.(2d) 385.

STATEMENT OF THE CASE

In addition to the facts stated by petitioner, the following findings are thought to be material: The dyke protects the field from inundation and thus permits the continued and uninterrupted production of oil from the field. Had the dyke not been built the production of oil would have been hampered and lessened in a substantial quantity (R. 75). The quarry in which and out of which the respondents worked was opened and operated especially to produce the gravel and rock for the dyke because of its formation and desirability (R. 75).

The facts found by the court as stated in the petition herein and in this response are unchallenged.

ARGUMENT

I.

From the facts stated respondents feel that the cases of *Roland Electric Company* v. *Walling*, L. ed. Advance Opinions, Vol. 90, No. 7, Page 326 and *Martino* v. *Michigan Window Cleaning Company*, L. ed. Advance Opinions, Vol. 9, No. 8, Page 386, are determinative of all questions raised by petitioner, with possibly one exception to be noted.

In *Roland Electric Co.* v. *Walling*, the employer was engaged in "commercial and industrial wiring, electrical contracting and dealing in electrical motors and generators, for private, commercial and industrial users." Most of its customers were engaged in interstate commerce. Such work

consisted of repairing motors, generators, the reconstruction of used motors sold to them, etc. None of the work done by these employees nor anything upon which they worked moved in commerce nor crossed any state line. This Court held that they were covered by the Act. In analyzing the Act the Court pointed out that the Act "does *not* require the employee to be directly 'engaged in commerce' among the several states * * * does not require the employee to be employed even in the production of an article which *itself* becomes the subject of commerce. It is enough that the employee be employed in an occupation which is necessary to the production of a part of any other 'article or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several states. This does not require that the occupation in which he is employed be indispensable to the production under consideration. It is enough that his occupation be '*necessary to the production.*' There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production." In the case at bar the trial court found and the finding is unchallenged that the purpose of the work in which respondents were engaged was to permit the continued and uninterrupted production of oil for interstate commerce and that if the dyke had not been built the production of oil would have been hampered and lessened in a substantial quantity.

Referring further to the employees in the *Roland Electric Company case* the Court stated that their services were

necessary to the continuity of production of goods for commerce and if such services had not been supplied by the petitioner its customers would have had to employ comparable employees of their own or of other contractors who would have been covered by the Act.

Likewise in point is the *Martino* v. *Michigan Window Cleaning Company case*: "The work of the respondent and its employees was done within the State of Michigan and, for the most part, on the premises of the respondent's customers. It consisted primarily of cleaning windows for those customers. The greater part of this work was done on windows on premises used by respondent's customers in the production of goods for interstate commerce." Such occupation was held to be one necessary to the production of the goods produced in those plants. As in the *Roland Electric Company case*, the Court pointed out that if the work had been done by employees of the customers they would have been covered. "Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts." The Court further pointed out that the work took place in the midst of producing "the flow of goods in commerce" intended to be covered by the Act. The same situation existed here. The dyke was built while the oil was being produced and so that the production thereof could continue unhampered.

Armour and Co. v. *Wanstock*,
323 U.S. 126;
Borden Company v. *Borella*,
325 U.S. 679;

Consolidated Timber Co. v. *Womack*,
(C.C.A. 9), 132 Fed.(2d) 101;

Mid-Continent Pipe Line Co. v. *Hargrove*,
(C.C.A. 10), 129 Fed.(2d) 655;

A. B. Kirchbaum Co. v. *Walling*,
316 U.S. 517;

Walton v. *Southern Package Corp.*,
320 U.S. 540;

Warren-Bradshaw Drilling Co. v. *Hall*,
317 U.S. 88;

Walling v. *Amidon*,
(C.C.A. 10), 153 Fed.(2d) 159;

Reynolds v. *Salt River Valley Water Users Ass'n*,
(C.C.A. 10), 143 Fed.(2d) 655;

Robertson v. *Oil Well Drilling Co.*,
(N.W.), 131 Pac.(2d) 978,

are other cases bearing upon the questions presented.

Walling v. *Craig* (D. Minn.), 53 Fed. Supp. 479, quoted from on Page 11 of the petition herein and other like cases relied on by petitioner can not be considered in point for they involved material furnished for and work done upon instrumentalities of commerce.

Petitioner urges that the decision herein extends coverage of the Act far beyond the point reached by any other court, and draws local operations of material men within the ambit of the statute for the first time. We think not. Petitioner can not be classified as a local material man. It was a sub-contractor carrying out part of an integrated contract. The quarry from which the rock came was opened by the prime contractor and was used for the one purpose only; petitioner furnished only machinery and labor. Whether or

not local material men as such while furnishing materials for a job similar to this would come within the Act need not now be decided.

It is further urged that the work done would seem to be a part of the dam project which would impound the waters which the dyke was to restrain rather than a part of oil production. No such issue was raised below and such is not the case, but if it were, respondents would still probably be covered by the Fair Labor Standards Act and if not by that Act, by the other Congressional enactments governing contracts let by the government. The dam was a power development and flood control project on a navigable stream built under the commerce clause of our Constitution. All who worked thereon were entitled to the benefits of fair labor standards laws. The application of the Act depends upon the character of the employees' activities and not the business of the employer. *Kirschbaum* v. *Walling, supra; Schmidtke* v. *Conesa* (C.C.A. 1), 141 Fed.(2d) 632; *Sykes* v. *Lochmann*, 156 Kan. 223, 132 Pac.(2d) 620, and the controlling factor here is that the respondents were engaged in the fulfillment of a contract which had for its purpose the protection of the oil field and making it possible for such field to continue to produce oil for interstate commerce and that the production thereof be not hampered or lessened but continued without interruption or diminution.

II.

The noted exception with reference to the matters determined by *Roland Electric Co.* v. *Walling* and *Martino* v. *Michigan Window Cleaning Co., supra*, is the contention that respondents were engaged in construction of a new structure which when completed was to be used in the production of goods for commerce. The stipulated facts and unassailed findings of the trial court disclose that the Cumberland Oil Field was discovered before the dyke was built; oil produced from the field was flowing in interstate commerce at the time construction of the dyke began. The quarry was opened for the particular purpose of producing the specified rock needed to meet government approval for the dyke and to build the dyke. It was used for no other purpose. The dyke was built, using the rock furnished by respondents' labors, for the purpose of protecting the oil field from the encroaching waters which were being backed up by the dam.

In his interpretative bulletin, G-162, the Administrator of the Wage and Hour Division of the Department of Labor stated that "employees engaged in the original construction of oil derricks and in related construction activities are engaged in processes or occupations necessary to the production of goods within the meaning of Section 3(j) of the Act." The reasoning upon which the Administrator proceeded is that the derrick is erected solely to the end of conducting drilling operations and that such a derrick can not be used for other productive purposes. He distinguishes such an operation from the construction of a building "which is intended to

produce specific types of commodities. The utility of such a factory building is not limited to the production of the commodity originally contemplated. There are numerous instances in which, because of economic factors, such as fluctuations in the demands for various factory products, plants have been remodeled, new machinery installed and commodities entirely different from those originally contemplated have been produced." Upon the same line of reasoning the Administrator concludes that employees engaged in such operations as "clearing land, digging pits, and building earthen fire walls, in connection with oil drilling operations" are properly to be regarded as within the general coverage of the Act.

Here, the dyke was built for one purpose only; it has no other use; economic factors can not change the use for which it was built and to which it is being put. Insofar as use is concerned the dyke was dedicated before being built because oil was then being produced and the dyke was rushed up for the purpose of protecting this production.

A similar contention was made in *Warren-Bradshaw Drilling Co.* v. *Hall, supra,* wherein this Court said:

> "The connection between respondents' activities in partially drilling wells and the capture of oil is quite substantial, and those activities certainly bear as 'close and immediate tie' to the production as did the services of the building maintenance workers held within the Act in *A. B. Kirschbaum* v. *Walling.*"

To which might be added the motor repair men and second hand motor rebuilders in *Roland Electric Company* v. *Walling,* the window washers in *Martino* v. *Michigan Window*

Cleaning Co., the watchman in *Walton* v. *Southern Package Corp.*, and *Robertson* v. *Oil Well Drilling Co.*, and the pipe line walker in *Mid-Continent Pipe Line Co.* v. *Hargrove* and others.

Petitioner observes that even if respondents be deemed to have been engaged in an integrated effort for the production of goods for commerce, still they can not be considered as covered by the Act for that their services were for the protection of the field, and they were engaged in a so-called local activity which merely supplied materials for such protection—not for production. In *Armour and Co.* v. *Wantock*, 323 U.S. 126, men who were employed as fire fighters only and had nothing to do with the production of goods were held within the Act, the employer producing goods for interstate commerce. There this Court said:

> "* * * an occupation is not to be excluded from the Act merely because it contributes to economy or to continuity of production. * * *"

CONCLUSION

In conclusion, the respondents respectfully submit that this case is not one which requires a review by the Supreme Court of the United States.

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